STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 98B066

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE ON THE LIMITED ISSUE OF COMPLAINANT'S EMPLOYMENT STATUS

ROBERT L. STEVENS,

Complainant,

vs.

DEPARTMENT OF AGRICULTURE, COLORADO STATE FAIR AUTHORITY,

Respondent.

THIS MATTER came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on March 17-18, 1998. Respondent was represented by Stacy L. Worthington, Assistant Attorney General. Complainant appeared and was represented by James R. Gilsdorf, Attorney at Law.

Respondent's witnesses were: Chris Wiseman, Director of Administrative Services for the Colorado State Fair; Paula Webb, former Personnel Administrator for the Colorado Department of Agriculture; Donald Drage, Human Resources Specialist, Department of Personnel/General Support Services, who was certified as an expert by experience in the administration of the state personnel system; Robert McLavey, Deputy Commissioner of Agriculture (in rebuttal); and Thomas A. Kourlis, Executive Director, Department of Agriculture (in rebuttal).

Complainant testified on his own behalf and called: Patricia Murray, former member of the State Fair Board; Alex Clark, member, State Fair Board; and Cecil Turner, former chairman of the State

Fair Board.

Respondent's Exhibits 1, 2 and 8, and complainant's Exhibits A through K were stipulated into evidence.

MATTER APPEALED

Complainant appeals his dismissal from employment as State Fair Manager.

ISSUE

Whether complainant occupied a permanent, full-time position in the state classified personnel system as a certified state employee.

PROCEDURAL HISTORY

On December 5, 1997, complainant filed a Notice of Appeal of his dismissal as General Manager of the Colorado State Fair, alleging that he was fired for "no cause" and was not advised of his right to appeal the termination. Unable to determine with certainty complainant's employment status or the Board's jurisdiction, the State Personnel Board, on December 10, 1997, mailed to complainant a request for additional information to include, among other things, the date of the alleged dismissal and a copy of the written notice, if any.

On December 29, 1997, through counsel, complainant responded to the request by providing information that he was dismissed on October 14, 1997 from the position of Colorado State Fair Manager, which was a state classified position within the Senior Executive Service. He alleged that he was certified in that position. An

enclosed copy of a termination letter indicated that complainant was dismissed under an employment contract.

On January 7, 1998, complainant filed a request to schedule a hearing on the issues of just cause, due process and age discrimination. Based upon complainant's representations, an evidentiary hearing was scheduled, it being noted that a central issue was complainant's job status at the time of termination.

Next, respondent filed a motion for clarification of the issues that were to be addressed at hearing. Due to the need to resolve the status issue in order to determine the appropriate course of the proceedings, on February 27, 1998, the Board issued an order advising the parties that the sole issue for determination at this stage was complainant's employment status at the time of his dismissal.

PRELIMINARY MATTERS

Because of a presumption that a state employee is a member of the classified personnel system, the burden was placed on respondent to go forward with the evidence and prove by a preponderance that complainant was not a member of the classified system. See Salas v. State Personnel Board, 775 P.2d 57 (Colo. App. 1988).

At complainant's request, the witnesses were excluded from the hearing room except when testifying, save complainant and respondent's advisory witness, Chris Wiseman.

Respondent moved to permit Don Drage to observe all testimony as an expert witness under CRE 615. The motion was denied on the ground that Drage was a potential fact witness as well.

FINDINGS OF FACT

- 1. Complainant, Robert L. Stevens, entered into an employment agreement with the Colorado State Fair Authority (CSFA) on April 1, 1997. (Exhibit 1.) The CSFA was not an agency of state government. Under the agreement, Stevens became the manager of the state fair at an annual base salary of \$72,500 plus bonuses. The contract provided that the annual salary would increase to \$85,000 upon a satisfactory performance evaluation. No time frame was set for the salary increase. The five-year contract specified that Stevens was an "at will" employee who was subject to dismissal with or without cause.
- 2. At the time of the negotiation of the agreement, the fair board members had the understanding that the position of manager would come under the purview of the state classified personnel system on July 1, 1997. They asked for and received a five year commitment from Stevens.
- 3. Chris Wiseman, who had been appointed by the governor in January 1995 to work on special projects within the governor's office, was assigned in March 1997 to work with the state fair board. He was to assist the board chairman, Cecil Turner, and Bernie Buescher, the interim fair manager.
- 4. Although the CSFA was not a state agency, Wiseman knew that it was the intent of the governor and the legislature to bring all state fair positions into the classified state personnel system.
- 5. The CSFA was deeply in debt, to the tune of more than three

million dollars. In order for the state to assume CSFA's debt, all CSFA positions, including that of fair manager, were to be brought into the state personnel system under a state agency.

- 6. Legislation was passed and signed by the governor in May 1997 abolishing the CSFA and creating the Colorado State Fair Authority as a division of the Colorado Department of Agriculture. Effective June 30, 1997, the then existing Board of Commissioners was to be replaced by a new board. (C.R.S. § 35-60-401.)
- 7. The statutorily defined functions of the new authority included directing the state fair and hiring and employing a fair manager.
- 8. Under the statute, any positions in the former authority that transferred to the Department of Agriculture were designated type 1 transfers.
- 9. Pursuant to a type 1 transfer, unlike type 2 and type 3 transfers where the incumbent employee transfers to classified status along with the position, the employees do not transfer with their positions. The position takes on classified status as a type 1 transfer, but the person currently holding the position does not. Consequently, there was no guarantee that any CSFA employees would hold their jobs after June 30, 1997, when a new fair authority took effect as a division of the Department of Agriculture.
- 10. The Colorado Department of Personnel/General Support Services had the responsibility for the recruitment, evaluation and testing of all applicants for the newly created classified positions. All rules, policies and procedures of the classified personnel system were implemented and followed.

- 11. Also passed by the legislature and signed by the governor in May 1997, to be effective June 30, 1997, was a statute creating the office of Manager of the Colorado State Fair Authority in the Senior Executive Service (SES) and subject to the appointment and removal provisions of the Colorado Constitution, Section 13 of Article XII, as well as all statutes pertinent to the state classified personnel system. (C.R.S. § 35-65-403.)
- 12. The SES allows greater latitude than normal in compensating certain high level employees. The rules, policies and procedures of the classified system apply to an SES position in the same manner as to any other classified position.
- 13. All state classified employees must serve a probationary or trial service period of up to one year before becoming certified. After one year, the employee must be certified in the position if the employee continues in state employment. The probationary period may be shortened at the discretion of the appointing authority. Theoretically, the probationary period may be as short as one day, but it may not be waived altogether.
- 14. The SES requires that a performance contract be entered into and duly executed by the SES employee and the executive director of the employing agency. (Exhibit 8.) The purpose of the contract is to set the employee's salary based upon job performance. In lieu of an agreement, the executive director may unilaterally determine the amount of the salary.
- 15. In late April or early May 1997, Don Drage and other representatives of the Division of Human Resource Services met with Chris Wiseman and representatives of the Department of Agriculture to discuss filling the state fair positions with classified

employees. They decided that the most important position to fill first was that of fair manager, followed in importance by the position of fair comptroller.

- 16. The job announcement for the position of "State Fair Manager (Senior Executive Service)" was advertised, with an application deadline of June 6, 1997. (Exhibit K.)
- 17. Stevens was the only applicant for the State Fair Manager position. He met the minimum qualifications. Because his was the only name on the eligibility list, no examination was given.
- 18. The name of Robert Stevens was referred by the Department of Personnel to "Chairman, State Fair Board" for an interview for the position of "Senior Executive Service." Stevens was instructed to contact the "above named person" by June 17, 1997, in order to be considered for the position. (Exhibit B.)
- 19. Stevens could not be brought into the classified system as a temporary employee because the position was permanent. Nor could he be brought in as a provisional employee, which would mean that he did not have a right to a hearing if terminated, because provisional status applies only when there is no eligibility list.
- 20. The only legal way to fill the SES position was through the classified system.
- 21. On June 17, 1997, the fair board held its last meeting before being abolished. The members voted to appoint Stevens to the fair manager position and to increase his annual salary to \$85,000, in keeping with the promise of \$85,000 in the April 1 contract as well as to place the salary near mid-range of the SES salary range,

which was between \$70,000 and \$105,000. It was their intent to appoint Stevens to the classified position, as opposed to renegotiating the April 1 contract which they believed would be null and void on July 1.

- 22. Wiseman and Tom Kourlis, Executive Director of the Department of Agriculture, both attended the June 17 meeting.
- 23. Wiseman advised the board members that they could appoint the new fair manager under the classified personnel system and that any contract they made would be binding on the new authority as long as the contract was not unconstitutional. Wiseman had been advised by a representative of the Department of Personnel that the existing board should go ahead and appoint Stevens in order to get the matter over with. Based upon conversations with Wiseman, who was the board's liaison with the governor's office, Chairman Turner understood that the governor wanted the board to appoint Stevens into the SES position and that the appointment would bind the new authority after July 1.
- 24. Turner believed that Stevens was being brought into the system as a certified employee. However, the word "certified" was never used during the June 17 meeting. There is no legal foundation for Turner's personal belief.
- 25. By the time Turner arrived home after the June 17 meeting, he had received a telephone call from the governor's office with a message to the effect that increasing the fair manager's salary at a time when the fair was in financial trouble was not a politically wise thing to do. Turner then telephoned both Wiseman and Stevens. The three of them got together at a restaurant, and Stevens agreed to defer the salary increase until after the state fair was held in

August and September. Stevens was not asked or expected to forego the increase.

- 26. On or about June 29, 1997, Wiseman was faxed a copy of an SES performance contract by the Department of Personnel. He first talked to Turner because he felt that Turner, as chairman of the board that made the appointment, would be the signatory for the agency. Then a meeting was held between Wiseman, Turner and Stevens. Turner did not want to sign the contract because it did not specify a salary of \$85,000, which the board had approved. Stevens did not feel comfortable agreeing to a contract that did not specify a salary of \$85,000.
- 27. There were no further negotiations between Stevens and the agency, either the old authority or the new authority, concerning the terms of the SES performance contract. The document was never executed. The document introduced as an exhibit at hearing is a blank copy of an SES performance contract.
- 28. Pursuant to statute, a new Colorado State Fair Authority came into existence as a state agency on June 30, 1997. The new Board of Commissioners consisted of eleven members, two of whom had been members of the previous board. Cecil Turner was not re-appointed. Robert Jackson, who was not a member of the previous board, became the board chairman. Tom Kourlis, as the Commissioner of Agriculture, became a voting member of the board rather than the ex officio member he had been on the previous board. Kourlis became the proper signatory for the SES performance contract since he was the executive director of the employing agency.
- 29. At the first board meeting of the new authority, Cecil Turner introduced Stevens as the fair manager and commended him. The new

board thereafter went about business as if Stevens was the fair manager. Stevens carried out all functions of the SES position.

- 30. Stevens acted as the state fair appointing authority after July 1, inclusive of hiring the fair comptroller under the state personnel classified system.
- 31. Prior to July 1, Stevens was paid by the CSFA. He testified that, after July 1, he was paid via warrants from the state treasury.
- 32. EMPL is an automated system that tracks employees in the state classified system. An employee must be in the EMPL system in order to be placed in the state payroll system. The name of Robert Stevens was never entered into the EMPL system. There was no testimony as to why this was not done, or whether anyone ever intended to do it. A person working for the state under the terms of a private employment contract would not have his name entered into the EMPL system.
- 33. On October 10, 1997, at a meeting of the fair commissioners, Stevens was told by Robert Jackson that his employment was going to be terminated. On October 14, 1997, Jackson hand-delivered a letter to Stevens advising him that his employment was terminated under the terms of the April 1 employment agreement. (Exhibit 2.)

DISCUSSION

A. Contentions

Respondent takes the position that an agency that is not a part of state government is without the authority to hire a state employee. Since the fair authority was not an agency of state government on June 17, 1997, it could not have brought complainant into the state classified personnel system. Contending that statutes are presumed prospective unless the statute itself provides otherwise, respondent argues that only the newly created Board of Commissioners could have filled the Senior Executive Service position of State Fair Manager, which did not exist prior to June 30, 1997. It follows, according to respondent, that Stevens was working under the April 1, 1997 employment contract because all contracts entered into by the former authority were to continue in full force and effect and were binding on the newly created authority.

In reliance on there being no evidence that complainant was a certified employee, respondent maintains that, at best, he was a probationary state employee. At the same time, respondent argues that complainant may have been in provisional status, affording him no rights under the classified system, despite the testimony of its own expert to the effect that complainant could not have been a provisional employee because an eligibility list had been established for the SES position.

It is complainant's argument that the employment agreement of April 1, 1997 is illegal and that, as of July 1, 1997, the state fair manager was a classified position and cannot be filled through a personal services contract, which is unlawful. Complainant relies

on Colorado Ass'n of Public Employees v. Department of Highways, 809 P.2d 988 (Colo. 1991) for the proposition that a personal services contract under the circumstances of this case is prohibited. (In Colorado Ass'n of Public Employees v. Department of Highways, the Court held that the agency's act of contracting with private vendors violated Article XII, section 13 of the Colorado Constitution.) Complainant contends that, pursuant to statute, and having gone through the competitive selection process of the classified system, there is no choice but to consider him a state classified employee within the Senior Executive Service.

Complainant argues further that the SES performance contract is a pay plan based upon job performance and is not a hiring document. The effect of a delay in the execution of the performance contract is that the appointing authority may unilaterally set the salary, but the person holds the position nonetheless.

Complainant contends, with little record support, that he was a certified classified employee but that, if not certified, he was in probationary status and had rights under the system.

B. Analysis

The testimony presented at hearing is replete with conflicting understandings and perceptions of the various witnesses concerning the nature of complainant's employment. The outcome is governed by the subject statutes which became effective on June 30, 1997.

C.R.S. § 35-65-401 provides in pertinent part:

Colorado state fair authority--creation--board--powers and duties--repeal

- (1) (a) The Colorado state fair authority, as it existed prior to June 30, 1997, is abolished. There is hereby created the Colorado state fair authority, which is created within the department of agriculture as a division thereof. The Colorado state fair authority shall exercise its powers, duties, and functions under the department of agriculture as if it were transferred to said department by a type 1 transfer under the provisions of the "Administrative Organization Act of 1968".
- (b) The function of the Colorado state fair authority is to direct and supervise the Colorado state fair and industrial exposition created pursuant to section 35-65-105.
- (2) (a) On June 30, 1997, the existing board of commissioners of the Colorado state fair authority is abolished, and the terms of the members of the board then serving are terminated.
- (b) There is hereby created the board of commissioners of the Colorado state fair authority, which shall have eleven members, ten of whom shall be appointed by the governor with the consent of the senate and one who shall be the commissioner of agriculture or his or her designee. At no time shall more than six members of the board be affiliated with the same political party as the governor. Within thirty days after June 30, 1997, the governor shall appoint the initial members of the board. The governor may appoint, as a member of the board, any person who was a member of the board prior to its termination.

. . . .

(9) The board shall:

. . . .

(c) Hire and employ the manager of the Colorado state fair authority in accordance with the provisions of section 35-65-403;

Office of manager of the Colorado state fair authority-creation

- (1) The office of the manager of the Colorado state fair authority is hereby created. The board shall appoint a manager of the Colorado state fair authority who shall have knowledge of livestock, agriculture, horticulture, scientific recreation, education, and industry, facilities, processes, and products of the state of Colorado and who shall have experience in fair management and promotion. The manager shall serve for an indefinite term and shall not hold any other public office but shall devote his or her entire time to the service of the state in the discharge of his or her official duties. appointment or removal of the manager shall be subject to the provisions of section 13 of article XII of the state constitution and the statutes enacted pursuant thereto. Notwithstanding any law to the contrary, the office of manager of the Colorado state fair authority shall be a position in the senior executive service for purposes of section 24-50-104(6)(e), C.R.S.
- (2) The manager shall be the chief administrative head of the Colorado state fair authority under the direction and supervision of the board and shall have general supervision and control of all activities, functions, and employees of the Colorado state fair authority and shall exercise all necessary powers incident thereto. The manager shall exercise all the powers and functions of the board in the interim of its meetings and shall perform such other duties as may be prescribed by the board or by law.
- (3) Any current state fair authority employee who was previously certified under the state personnel system and who is returning to the state personnel system pursuant to this part 4, as amended by House Bill 97-1342, enacted at the first regular session of the sixty-first general assembly, shall be eligible for reinstatement.

In accord with the acts of the legislature and the governor, the SES position of State Fair Manager came into existence on June 30, There is no persuasive argument that the statutes can be, or should be, ignored. Everyone knew that the intent was to bring the state fair authority under the purview of a state agency and make the fair manager position a classified position. Complainant went through the competitive process of the merit system and was referred by the Department of Personnel to the chairman of the fair board for an interview on June 17, 1997. The existing board hired complainant from a proper eligibility list. He was introduced to the Board of Commissioners as fair manager at the first meeting of the new authority. He was accepted, either implicitly or explicitly, as the fair manager by the commissioners. He performed all functions of the SES position during July, August, September and into October. He functioned as the appointing authority when he employed the fair comptroller through the classified system. There was only one fair manager position, and Stevens held it.

Complainant became a classified employee on June 30, and the April employment agreement necessarily became null and void. The commissioners could not continue to employ the fair manager under a personal services contract in the face of legislation to the contrary.

The fair board could have, and perhaps should have, formally terminated the April 1 agreement as of June 29. Nevertheless, the fair manager position was never vacant after Stevens was originally hired. The Board of Commissioners took no action whatsoever to fill the SES position. They thought they had a manager, and the manager had to be a classified employee according to the binding legislation. Neither the executive director of the Department of Agriculture nor a representative of the governor's office said

otherwise. By inference, at least, the Board of Commissioners after June 30 adopted as their own the June 17 action of the then existing board.

Whether or not complainant's name was listed in the EMPL system is not dispositive of his employment status. There was no testimony of the reasons for an omission, which may have been inadvertent, intentional or a misunderstanding. The only evidence of the source of complainant's salary is his unrefuted testimony that he was paid from the state treasury after June 30, whereas he was previously paid by the fair authority.

There are no provisions contained in the SES performance contract with respect to the offer and acceptance of employment. It is a performance contract, not an employment contract. The factors listed in the document are performance evaluation factors, and the salary is to be set based upon the performance of the employee.

All employees within the classified personnel system must serve a probationary period. No credible evidence was introduced at hearing to demonstrate that complainant's probationary period was waived or shortened.

In sum, complainant was a classified, probationary employee commencing June 30, 1997.

C. The Next Step

In appealing his dismissal to the State Personnel Board, complainant provided a copy of the termination letter which indicates that he was dismissed under the terms of the April 1, 1997 at-will employment agreement. (See Hearing Exhibit 2.) No

cause was stated in the letter, and none was required under the contract. Complainant was not advised of his right to appeal the termination action, and his notice of appeal is hereby found timely.

C.R.S. § 24-50-125(5) provides that a probationary employee has the same rights to a hearing as a certified employee except when dismissed for unsatisfactory performance, as follows:

In addition, the board shall hold a hearing within forty-five days of the appeal, upon request by the employee or his representative, for any certified employee in the state personnel system who protests any action taken which adversely affects the employee's current base pay as defined by board rule, status, or tenure. A probationary employee shall be entitled to all the same rights to a hearing as a certified employee; except that he shall not have the right to a hearing to review his dismissal for unsatisfactory performance while a probationary employee....

Since complainant's employment was not terminated for unsatisfactory performance, but rather pursuant to an at-will employment contract, he is entitled to an evidentiary hearing the same as if he were certified.

In two documents filed with the Board, complainant requested an evidentiary hearing on all issues, including age discrimination. The discrimination issue has not been referred to the Colorado Civil Rights Division for investigation. Complainant is deemed to have waived the discrimination investigation. However, if he wishes to have the allegation of discrimination investigated, he may file a request with the Board within ten days of the mailing of this decision, and the matter will be stayed pending the investigation. Otherwise, this matter will proceed to hearing.

CONCLUSIONS OF LAW

Complainant was a permanent, full-time probationary employee in the state classified personnel system.

ORDER

An evidentiary hearing shall be held to resolve all remaining issues with respect to the termination of complainant's employment.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of April, 1998, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE ON THE LIMITED ISSUE OF COMPLAINANT'S EMPLOYMENT STATUS in the United States mail, postage prepaid, addressed as follows:

James R. Gilsdorf Attorney at Law 1390 Logan Street, Suite 402 Denver, CO 80203

and in the interagency mail, addressed as follows:

Stacy L. Worthington
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